**APPENDIX A**

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock Street
Denver, CO 80202

---

Case Number: 00 CV 4787

---

CHARLES A. NICHOLS,

*Plaintiff,*

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

*Defendant.*

---

**ORDER OF JUDGMENT**

---

THIS MATTER came on for trial on September 15, 2003. On September 18, 2003, a jury of seven duly sworn to try the issues herein returned a verdict in favor of Plaintiff and against Defendant. Specifically, the jury returned Verdict Form B (attached) and submitted its answers to special interrogatories 1—9. In so doing, the jury found both Plaintiff and Defendant negligent; that their negligence jointly contributed to Plaintiff's damages (see answers to questions number 1—5, Verdict Form B) and awarded damages of $800,000.00 (see answer to question number 6, Verdict Form B). The Court has considered the Defendant's Brief In Regard to the Net Jury Verdict, filed September 19, 2003 and the Plaintiff's Motion for Entry of Judgment, also filed September 19, 2003. Having reviewed all pertinent pleadings and legal authority, the Court makes the following findings, conclusions and orders.

It is undisputed that, given the jury's finding of contributory negligence, their award of damages is properly reduced to $560,000.00, reflecting that degree of negligence the jury found attributable to the Plaintiff (thirty [30%] percent). The question before the Court is whether, and to what extent, if any, the remaining award should be reduced in light of the jury's answer to questions number 7 and 8. Question number 7 reads as follows:

> **If your answers to Question Nos. 1 and 2 are "Yes," is all or part of Plaintiff's condition attributable to a pre-existing condition, if any?**
>
> **ANSWER: Yes.**

Question number 8 reads as follows:

> **If your answer to Question No. 7 is "Yes," what percentage of Plaintiff's condition is attributable to a pre-existing condition, if any?**
>
> **ANSWER: 70%**

Relying upon the holding in *Sauer v. Burlington Northern Railroad Company*, 106 F.3d 1490 (10th Cir. 1996), Defendant asks this Court to further reduce the jury's award by the percentage found to be attributable to pre-existing conditions, e.g. seventy (70%) percent. To the contrary, Plaintiff urges this Court to construe the jury's verdict so as to limit the reduction in the award solely to the percentage of the jury's finding of contributory negligence. This Court disagrees. To apply the construction proffered by Plaintiff necessarily ignores the jury's complete findings in this case, namely that Plaintiff was contributorily negligent **and** that his injuries complained of were primarily pre-existing the date of the accident. Applying the rationale set forth in *Sauer*, the Court finds that a further reduction of the jury's award is necessary and consistent with the jury's findings in this case.

Accordingly, the Court orders that the jury's award in this matter is properly reduced by the amount of contributory negligence attributable to the Plaintiff (30%) and, further by the percentage amount attributable to his pre-existing condition (70%), The Court further finds that the Defendant has filed an uncontested Amended Motion for Credits, in the amount of $3049.14, and said motion is hereby GRANTED. Plaintiff's Motion for Entry of Judgment is hereby DENIED.

Therefore, the Court hereby enters judgment, in favor of the Plaintiff, Charles A. Nichols, and against the Defendant, Burlington Northern Santa Fe Railway Company, in the amount of $164,950.86. Judgment enters pursuant to CRCP 58(a), effective today, and the effective date of entry of this judgment shall not be delayed for the taxing of costs. The clerk shall enter this judgment on the register of actions pursuant to C.R.C.P. 79(a).

Done and signed this 22nd day of September 2003.

BY THE COURT:

/s/ [Illegible]
Michael A. Martinez
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

City and County Building
1437 Bannock Street
Denver, CO 80202

---

Case Number: 00 CV 4787

---

CHARLES A. NICHOLS,
*Plaintiff(s),*

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
*Defendant(s).*

---

SPECIAL VERDICT FORM B

---

We, the jury, present out answers to the questions submitted by the Court, to which we have all agreed:

1: Was the Defendant negligent on November 7, 1999?

ANSWER: YES (Yes or No)

If your answer is "No" do not answer the remaining questions. Sign the verdict form

2: If your answer to Question No. 1 was "Yes", did the Defendant's negligence, if any, a cause of any of the injuries, damages or losses claimed by the Plaintiff on November 7, 1999?

ANSWER: YES (Yes or No)

If you [*sic*] answer is "No" do not answer the remaining questions. Sign the verdict form.

3: If your answers to Question Nos. 1 and 2 were "Yes" was the Plaintiff negligent on November 7, 1999?

ANSWER: YES (Yes or No)

If you [*sic*] answer is "No" proceed to Question No. 6.

4: If your answer to Question No. 3 was "Yes", did the Plaintiff's negligence cause any of his own claimed injuries on November 7, 1999?

ANSWER: YES (Yes or No)

If your answer is "Yes" proceed to Question No. 5. If you [*sic*] answer to Question No. 4 is "No" proceed to Question No. 6.

5: Taking as 100 percent of the combined negligence of the Defendant and the Plaintiff that caused the Plaintiff's damages, what percentage of the negligence was the Defendant's and what percentage was the Plaintiff's?

ANSWER: Percentage charged to Defendant,

The Burlington Northern and Santa Fe Railway Company 70%

Percentage charged to Plaintiff,

Charles A. Nichols 30%

Proceed to Question No. 6.

6: What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury?

ANSWER: $800,000

Proceed to Question No. 7.

7: If your answers to Question Nos. 1 and 2 are "Yes", is all or part of Plaintiff's condition attributable to a pre-existing condition?

ANSWER: YES (Yes or No)

If your answer is "No" proceed to Question No. 9.

8: If you [*sic*] answer to Question No. 7 is "Yes", what percentage of Plaintiff's condition is attributable to a pre-existing condition, if any?

ANSWER: 70%

Proceed to Question No. 9.

9: Did Plaintiff fail to mitigate his damages?

ANSWER: NO (Yes or No)

If your answer is "No" sign the verdict form.

10: If you [*sic*] answer to Question No. 9 is "Yes", what amount of Plaintiff's damages expressed in dollars as determined in response to Question No. 6 do you find could have been avoided by Plaintiff had he taken reasonable steps to mitigates his damages?

ANSWER: $___

[Illegible]
Foreman or Forewoman
[Illegible]
[Illegible]
[Illegible]

[Illegible]
[Illegible]
[Illegible]

**APPENDIX B**

COLORADO COURT OF APPEALS

---

Court of Appeals No.: 03CA2145
City and County of Denver District Court No. 00CV4787
Honorable Michael A. Martinez, Judge

---

CHARLES A. NICHOLS,
*Plaintiff-Appellant and Cross-Appellee,*
v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,
*Defendant-Appellee and Cross-Appellant.*

---

JUDGMENT AFFIRMED

Division IV
Opinion by: JUDGE CARPARELLI
Roy and Russel, JJ., concur

Announced: March 23, 2006

---

Roberts Levin & Patterson, P.C., Thomas L. Roberts, Laura E. Schwartz, Denver, Colorado; Law Offices of Martin E. Jackson, P.C., Martin E. Jackson, Conifer, Colorado, for Plaintiff-Appellant and Cross-Appellee

Hall & Evans, L.L.C., Malcolm S. Mead, Frederick T. Martinez, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

In this negligence action under the Federal Employers' Liability Act, 45 U.S.C. § 51, et seq. (2005) (FELA), plaintiff, Charles A. Nichols, a locomotive engineer, appeals the amount of the damages awarded to him upon a jury verdict

against defendant, Burlington Northern and Santa Fe Railway Company. On cross-appeal, the railroad appeals the judgment entered in favor of Nichols. We affirm.

The engineer's back and knee were injured when he lost his grip on a locomotive handrail and fell. The injuries aggravated pre-existing degenerative conditions and left him permanently disabled and unable to return to work.

The engineer sued pursuant to FELA, alleging the railroad's negligence caused (1) cumulative traumatic injury resulting in severe neck strain and injury and (2) injuries to his lower back and right knee that aggravated existing conditions.

The trial court granted the railroad's motion for summary judgment pursuant to C.R.C.P. 56, but a division of this court reversed and remanded the case for a trial on the merits. *Nichols v. Burlington N. & Santa Fe Ry.*, 56 P.3d 106 (Colo. App. 2002).

The parties settled the engineer's cumulative trauma claim before trial; they went to trial on the engineer's allegations that the railroad negligently failed to place reasonable work restrictions on him and failed to transfer him to a less strenuous position, and that both actions further aggravated his pre-existing conditions. The engineer claimed the railroad knew about the weakened strength in his right hand and negligently allowed him to continue working without restrictions, and that this negligence caused the fall. In response, the railroad asserted the engineer's contributory negligence and pre-existing conditions as affirmative defenses.

Following a four-day trial, the jury returned a verdict for the engineer. It valued the engineer's loss at $800,000, but determined his contributory negligence was 30%. Based on this finding, the court reduced the damages to $560,000. The jury also determined that 70% of his post-accident condition was attributable to a pre-existing condition. Based on this finding, the court further reduced the damages to $168,000.

The court also reduced the damages by $3049.14 based on the railroad's uncontested amended motion for credits.

Thus, the trial court entered a judgment in favor of the engineer in the amount of $164,950.56.

I. Certificate of Review and Expert Testimony

We first consider and reject the railroad's contention that the engineer's claim alleged negligence of medical professionals and that the judgment must be reversed because the engineer neither filed a certificate of review pursuant to § 13-20-602, C.R.S. 2005, nor presented expert testimony regarding the applicable standard of care.

A. Law

In every action for damages based on the alleged professional negligence of a licensed professional, the plaintiff's attorney must file a certificate of review within sixty days of serving the complaint. Section 13-20-602.

Under FELA, railroads have a duty to assign employees work for which they are reasonably suited. An employee may sue a railroad for damages caused by the railroad's negligent assignment of work beyond the employee's capacity. 45 U.S.C. § 51.

A railroad may also be liable for injuries to an employee if its doctors negligently perform physical examinations and negligently certify the employee to return to work without restrictions. Despite the railroad's reliance on the doctors, however, the employee is not required to demonstrate malpractice by the railroad's doctors. Instead, "it is sufficient to show that the railroad knew or should have known that the employee was unfit for the work because of his condition." *Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980); *see also Dunn v. Conemaugh & Black Lick R.R.*, 267 F.2d 571 (3d Cir. 1959) (concluding the railroad was liable for negligence pursuant to FELA when its doctor prematurely

certified the plaintiff's return to heavy labor). Thus, the primary focus of a claim under FELA is not the medical standard of care or the doctor's adherence to it, but rather, the railroad's knowledge that the employee could not return to work because of his medical condition.

Here, the railroad filed a pretrial motion to dismiss the case based on the engineer's failure to file a certificate of review. The trial court denied the motion, finding the remaining issues for trial were based on the railroad's negligence, not medical malpractice.

B. Conclusion

The engineer sued the railroad for negligence based on its failure to provide him with a reasonably safe work environment; he did not sue the railroad's doctors for medical malpractice. Several of the railroad's doctors examined the engineer and expressed conflicting opinions about whether to return him to work without restrictions. The final decision was made by the railroad's chief medical officer.

Because the engineer did not sue the doctors for medical malpractice, he was not required to file a certificate of review or to present evidence regarding a medical standard of care.

II. Damages

The engineer contends that, under FELA, a trial court may not reduce an award of damages other than as required by the statute for contributory negligence. We disagree.

The engineer has constructed his argument to traverse a narrow path. He concedes that the court correctly instructed the jury regarding the manner in which it could consider pre-existing conditions when determining damages and that it must be presumed that the jury followed that instruction when it arrived at the damages award entered on the special verdict form. However, he asserts that the import of the jury's answers to special verdict form questions addressing pre-exist-

ing conditions is unclear and that the trial court erred when, relying on those answers, it reduced the jury's damages. We are not persuaded.

A. Preservation of the Issue

A party is required to make specific, contemporaneous objections to special verdict forms before the trial court gives the forms to the jury. *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375 (Colo. App. 1996). Such objections allow the trial court to correct errors or clarify ambiguities before the forms are given to the jury, *See Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315 (Colo. 1996); *Baum v. S.S. Kresge Co.*, 646 P.2d 400 (Colo. App. 1982). We may consider errors in verdict forms only to the extent that the grounds on appeal were specified by objection before the trial court instructed the jury. C.R.C.P. 51; *Bear Valley Church of Christ v. DeBose, supra.*

Here, before the jury was instructed, the engineer objected to Special Verdict Form B, asserting that the issue of pre-existing conditions is one that the parties may argue to the jury, and that the jury considers pre-existing conditions when it makes its award of damages. He emphasized that although FELA permits the court to reduce a jury's award based on contributory negligence, it does not permit the court to reduce an award based on pre-existing conditions.

Although the engineer's objection referenced *Sauer v. Burlington Northern RR.*, 106 F.3d 1490 (10th Cir. 1996), on appeal he asserts that *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 123 S.Ct. 1210, 155 L.Ed.2d 261 (2003), applies.

We conclude that the engineer's objection was specific on the question of the propriety of the court's reduction of the damages award based on the jury's responses to the verdict form questions concerning pre-existing conditions. Accordingly, the engineer preserved the issue of the propriety of the

trial court's reduction of damages based on the jury's findings regarding pre-existing conditions.

However, to the extent the engineer now argues that the special verdict form was unclear because the questions regarding pre-existing conditions appeared in the wrong order on the form, the engineer stated no such objection at trial and, therefore, failed to preserve that issue.

B. Law

We first reject the engineer's argument that, under *Norfolk & Western Ry. v. Ayers, supra*, a trial court may only apportion damages in FELA cases based on comparative fault.

In *Ayers*, the United States Supreme Court concluded that the railroad must "bear the burden of identifying other responsible parties and demonstrating that some of the costs of the injury should be spread to them." *Norfolk & W. Ry. v. Ayers, supra*, 538 U.S. at 165, 123 S.Ct. at 1228. The Court did not state that railroads may be held liable for losses caused by an employee's pre-existing injuries and not aggravated by the railroad's negligence. *See Rust v. Burlington N. & Santa Fe Ry.*, 308 F. Supp. 2d 1230 (D. Colo. 2003). To the contrary, the award of damages against a railroad may exclude the proportion of losses that the employee's pre-existing condition would inevitably cause, regardless of the railroad's negligence. *Sauer v. Burlington N. R.R., supra; Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594 (1st Cir. 1996); *Lancaster v. Norfolk & W. Ry.*, 773 F.2d 807 (7th Cir. 1985); *Maurer v. United States*, 668 F.2d 98 (2d Cir. 1981); *see* 3A Fed. Jury Prac. & Instr. § 155.65 (5th ed. 2001); CJI-Civ. 4th 6:8 (2004). Moreover, *Ayers* is not dispositive of whether a trial court may calculate the appropriate exclusion and reduce damages based on a jury's determination regarding the extent to which an employee's losses were caused by the negligence of the railroad and the extent to which they were caused by a pre-existing condition.

C. Instruction and Verdict Form

Here, consistent with the foregoing, the trial court instructed the jury that, if it found that (1) before the engineer fell from the locomotive, the engineer had a pre-existing condition in his right knee and lower back, and (2) the railroad's negligence regarding the fall from the locomotive made the engineer's condition worse, it was required to determine, if possible, the amount of damages, if any, caused only by the railroad's negligence. The court further instructed that, if the jury was not able to separate the damages in this way, the railroad was legally responsible for the entire amount of damages.

In pertinent part, Special Verdict Form B included the following questions and jury responses:

1. Was the [d]efendant negligent on November 7, 1999?

   ANSWER: yes

2. [D]id [sic] the [d]efendant's negligence, if any, a cause of any of the injuries, damages or losses claimed by the [p]laintiff on November 7, 1999?

   ANSWER: yes

3. [W]as the [p]laintiff negligent on November 7, 1999?

   ANSWER: yes

4. [D]id the [p]laintiff's negligence cause any of his own claimed injuries on November 7, 1999?

   ANSWER: yes

5. [W]hat percentage of the negligence was the [d]efendant's and what percentage was the [p]laintiff's?

ANSWER:

Percentage to Defendant, 70%

Percentage to Plaintiff, 30%

6. What amount do you find, without any reduction for any negligence which you may find on the [p]laintiff's part, will fairly and adequately compensate the [p]laintiff for the injury?

   ANSWER: $800,000

7. [I]s all or part of [p]laintiff's condition attributable to a pre-existing condition?

   ANSWER: yes

8. [W]hat percentage of [p]laintiff's condition is attributable to a pre-existing condition?

   ANSWER: 70%

After the jury returned its verdict and findings, the trial court reduced the compensation amount by thirty percent based on the engineer's contributory negligence, and by seventy percent based on the pre-existing condition.

The engineer contends that the amount the jury inserted in response to question six indicated either (1) that the jury had already determined the amount of damages caused only by the aggravation of his pre-existing condition and concluded that the amount which would fairly compensate him for injuries he sustained solely as a result of the accident was $800,000; or (2) that the jury was not able to separate the pre-existing condition from the aggravation of those conditions and that $800,000 represents the indivisible amount of the total damages for which the railroad was liable.

D. Conclusions

Although the combination of the instruction and the special verdict form are not models for future use, the instructions, when taken as a whole, properly informed the jury regarding

the applicable law. Thus, the trial court did not err when it reduced the damages in accordance with the jury's responses to questions seven and eight.

The amount of damages to which a plaintiff is entitled is a matter within the sole province of the jury. *Roberts v. C & M Ready Mix Concrete Co.*, 767 P.2d 769 (Colo. App. 1988). When possible, trial courts must give effect to a jury's verdict.

On appeal, we must attempt to reconcile a jury's answers to special verdict questions if we can do so based on the evidence and the instructions given. *Kepley v. Kim*, 843 P.2d 133 (Colo. App. 1992); *Lonardo v. Litvak Meat Co.*, 676 P.2d 1229 (Colo. App. 1983).

The first three questions on the special verdict form addressed the railroad's liability to the engineer. The fourth and fifth questions addressed the engineer's contributory negligence. The sixth question asked the jury to determine the amount that would compensate the engineer for the injury he incurred when he fell from the locomotive. That question explicitly advised the jury not to consider any reduction based on the engineer's contributory negligence. It was silent as to damages for aggravation of pre-existing conditions.

The engineer's evidence showed that his losses were between $600,000 and $800,000, and he argued that the jury should award him between $750,000 and $950,000. Both parties' closing arguments focused on the issue of negligence. Neither argument addressed the effect of pre-existing conditions on the engineer's damages. None of the first six questions on the verdict form addressed pre-existing conditions. We conclude that the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the railroad's negligence or for pre-existing conditions.

We reject the engineer's argument that the jury may have arrived at the $800,000 figure after determining the extent to which his losses were caused only by the aggravation of his pre-existing condition.

The special verdict form directed the jury to address fair compensation before it directed the jury to address the engineer's pre-existing condition. Moreover, to arrive at the $800,000 figure after reducing the engineer's losses by the seventy percent attributable to pre-existing conditions, as reflected in the response to question eight, the jury first would have had to conclude that the engineer's total, unreduced damages were more than $2.5 million. There was no evidence upon which the jury could have concluded that the engineer's damages exceeded $1 million.

Therefore, we conclude that the jury did not adjust the compensation amount reflected in the response to question six based on its determination of the relative effect of pre-existing conditions and the railroad's negligence. Consequently, we also conclude that the trial court did not err when it reduced the compensation the jury stated in response to question six based on the jury's response to questions seven and eight of Special Verdict Form B.

III. Attorney Fees

Pursuant to C.A.R. 38(d), the engineer requests reasonable attorney fees and expenses incurred in defending against the railroad's argument on cross-appeal. Although we reject the railroad's arguments on cross-appeal, we cannot conclude those arguments are frivolous within the meaning of C.A.R. 38(d). Thus, the engineer's request for attorney fees and expenses is denied.

Judgment affirmed.

JUDGE ROY and JUDGE RUSSEL concur.

**APPENDIX C**

COLORADO COURT OF APPEALS

[Filed May 25, 2006]

---

No. 03CA2145

---

CHARLES A. NICHOLS,
*Plaintiff-Appellant / Cross-Appellee,*

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
*Defendant-Appellee / Cross-Appellant.*

---

APPEAL FROM THE DENVER DISTRICT CIVIL COURT
HONORABLE MICHAEL A MARTINEZ, JUDGE
NO. 00CV4787

---

ORDER DENYING PETITION FOR REHEARING

---

The PETITION FOR REHEARING filed in this appeal by:

CHARLES NICHOLS/PLAINTIFF-APPELLANT

CHARLES NICHOLS/PLAINTIFF-APPELLANT

is DENIED. OPINION MODIFIED AND AS MODIFIED PR DENIED

Issuance of the Mandate is stayed until: June 26, 2006

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay shall remain in effect until disposition of the cause by that Court.

By the Court:

CARPARELLI, J.
ROY, J.
RUSSEL, J.

COLORADO COURT OF APPEALS

---

Court Of Appeals No.: 03CA2145
City and County of Denver District Court No. 00CV4787
Honorable Michael A. Martinez, *Judge*

---

CHARLES A. NICHOLS,
*Plaintiff-Appellant and Cross-Appellee,*

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
*Defendant-Appellee and Cross-Appellant.*

---

JUDGMENT AFFIRMED

Division IV
Opinion by: JUDGE CARPARELLI
Roy and Russel, *JJ.*, concur

Opinion Modified, and As Modified
Petition for Rehearing *DENIED*

Announced: March 23, 2006

---

Roberts Levin & Patterson, P.C., Thomas L. Roberts, Laura E. Schwartz, Denver, Colorado; Law Offices of Martin E. Jackson, P.C., Martin E. Jackson, Conifer, Colorado, for Plaintiff-Appellant and Cross-Appellee

Hall & Evans, L.L.C., Malcolm S. Mead, Frederick T. Martinez, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

* * * *

OPINION is modified as follows:

Page 13, line 14 currently reads:

> injuries did not include any offset for the railroad's negligence or for

Page 13, line 14 is modified to read:

> injuries did not include any offset for the engineer's negligence or for

* * * *

would compensate the engineer for the injury he incurred when he fell from the locomotive. That question explicitly advised the jury not to consider any reduction based on the engineer's contributory negligence. It was silent as to damages for aggravation of pre-existing conditions.

The engineer's evidence showed that his losses were between $600,000 and $800,000, and he argued that the jury should award him between $750,000 and $950,000. Both parties' closing arguments focused on the issue of negligence. Neither argument addressed the effect of pre-existing conditions on the engineer's damages. None of the first six questions on the verdict form addressed pre-existing conditions. We conclude that the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the engineer's negligence or for pre-existing conditions.

We reject the engineer's argument that the jury may have arrived at the $800,000 figure after determining the extent to which his losses were caused only by the aggravation of his pre-existing condition.

**APPENDIX D**

SUPREME COURT, STATE OF COLORADO
*Two East 14th Avenue*
Denver, Colorado 80203

---

CASE NO. 06SC413

---

CHARLES A. NICHOLS,
*Petitioner/Cross-Respondent,*

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
*Respondent/Cross-Petitioner.*

---

CERTIORARI TO THE COURT OF APPEALS,
03CA2145 DISTRICT COURT,
CITY & COUNTY OF DENVER, 00CV4878

---

ORDER OF COURT

---

Upon consideration of the Petition and Cross-Petition for Writs of Certiorari to the Colorado Court of Appeals, and after review of the record, briefs, and the judgment of said court of appeals,

IT IS THIS DAY ORDERED that said Petition and Cross-Petition for Writ of Certiorari shall be, and the same hereby are, DENIED.

BY THE COURT, EN BANC, DECEMBER 18, 2006.

[Logo]

Copies mailed via the State's Mail Services Division on 12/18/06

Thomas L. Roberts
Roberts Levin & Patterson
1660 Wynkoop St., Ste. 800
Denver, CO 80202

Frederick T. Martinez
Malcom S. Mead
Hall & Evans
1125 17th St., Ste. 600
Denver, CO 80202

Law Offices of Martin E.
Jackson, P.C.
PO Box 862
Conifer, CO 80433

Clerk of the District Court
City & County Building
1437 Bannock, Rm 256
Denver, CO 80202

Honorable Michael A.
Martinez
City & County Building
1437 Bannock, Rm 256
Denver, CO 80202

Clerk of the Court
Colorado Court of Appeals

# APPENDIX E

## 45 U.S.C. § 51

**§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

## 45 U.S.C. § 52

### § 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

## 45 U.S.C. § 53

### § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any

statute enacted for the safety of employees contributed to the injury or death of such employee.

---

## 45 U.S.C. § 54

### § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

**APPENDIX F**

DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, CO 80202

[Filed FEB. 13, 2004]

---

Case Number: 00 CV 4787
Courtroom 7
Volume II

---

CHARLES A. NICHOLS,
*Plaintiff,*

v.

BURLINGTON NORTHERN & SANTA FE RAILWAY,
*Defendant.*

---

TRANSCRIPT OF RECORDED PROCEEDINGS

---

The above-entitled matter was heard on Wednesday, September 17, 2003 before the Honorable Michael A. Martinez, Judge of the District Court.

Appearances.

Charles A. Nichols, Plaintiff
Martin E. Jackson, Plaintiff's Attorney

Burlington Northern & Santa Fe Railway
Frederick T Martinez, Defendant's Attorney

INDEX


| | Direct | Cross | Redirect | Recross |
|---|---|---|---|---|
| Witnesses: | | | | |
| Sue Nichols | 15 | 21 | 34 | 37 |
| Peter Weingarten, M.D. | 40 | 50 | 59 | 60 |
| Michael Jarrard, M.D. | 63 | 71 | 90 | 92 |
| Charles Nichols | 100 | 109 | 112 | |
| Dr. James Mandel | 118 | 142 | 159 | 164 |
| Thomas Starkey, M.D. | 178 | 189 | 200 | 204 |
| Rita Blecha | 207 | 217 | 221 | 222 |

| Exhibits | Admitted |
|---|---|
| Exhibit SS | 27 |


* * * *

[40] assign Mr. Nichols to a job that he was—was not suited for because of his weakened physical condition, and did the railroad know that. So I think that Mr. Jackson gets to argue that with the previous instruction I've agreed to give, and I won't give the second one.

MR. JACKSON: Number 10 has been given apart and modified by the Court (inaudible) the mitigation instruction.

THE COURT: And so those are the two that were withdrawn according to the sticky's I have.

MR. JACKSON: The last two.

THE COURT: The last two.

MR. JACKSON: Yes, Your Honor.

THE COURT: Okay. So that completes the plaintiff's instructions. Now, don't go anywhere yet. I want to make sure—

MR. MARTINEZ: We haven't addressed the verdict forms, Judge.

MR. JACKSON: I think he did.

THE COURT: Yeah, I did. I'm going to use A and B, and I'm not going to use the interrogatories.

MR. MARTINEZ: Judge, I gave the Court my copy, because Mr. Jackson didn't have his (inaudible). So (inaudible).

THE COURT: Sure. Hang on a second.

[41] MR. JACKSON: And thank you for that.

THE COURT: Here's yours. And you'll see that the objections you pointed out to me earlier in terms of where his address was, and stuff, I whited that out. But otherwise the language tracks yours. It's just in two different forms. So frankly I think that makes it a little easier for the jury, and for you. I mean (inaudible) if you believe the defense case, and you fill out their Form A, go to question—to question three, and don't go anywhere else.

MR. MARTINEZ: The problem, Judge, is this. My verdict form is different. It has additional elements. Our verdict form actually asks the jury to address the issues of pre-existing. It also asks the jury to address the issue of mitigation of damages, and then to assign a percentage or number to that so that the Court can then reduce it. And those are the instructions that we have already tendered to the Court to rule on. His instructions only address contributory negligence, special verdict form B. That's the only reduction.

THE COURT: Okay.

(Pause.)

MR. MARTINEZ: In light of the Court's ruling, I will not—

THE COURT: You know what? I didn't have the last [42] para—I didn't have the last page, for some reason, as to the mitigation issues. Mr. Jackson, in light of the fact that I have already said I'm going to give them a mitigation instruction, and we've given two other instructions defining mitigation in some fashion, I think it's appropriate to give them the language to fill it out so we know what their determination is on those issues. And then as a matter of law, the Court reduces any verdict, if appropriate, based on their response to those questions.

So what I would propose, and ask you to look at, Mr. Martinez, is the verdict form. And what I would propose is using your verdict form A as it is, and using Mr. Martinez's Special Verdict Form, modified to reflect that it's Verdict Form B.

MR. JACKSON: I—may I be heard, Your Honor?

THE COURT: Yeah.

MR. JACKSON: No objection to using my verdict form. Very strenuous objection to using Mr. Martinez's verdict form. The only reduction that the Court is allowed to make under the FELA is pursuant to 45 U.S.C. § 53, which is the contributory negligence statute, and that's why my verdict forms are submitted the way they are. There are reductions of mitigation, and a reduction for—what was the other thing on this form, Your Honor?

MR. MARTINEZ: Pre-existing condition.

[43] MR. JACKSON: Pre-existing condition. That is argument that must be made to the jury, and the jury makes its award. The only reduction provided by the federal law is for contributory negligence. That is appropriate for the Court to do after the jury renders its verdict. It is not appropriate for that to be submitted to the jury, nor for them to make a finding.

MR. MARTINEZ: Actually, Judge, under the Sower v. Bogatilla case, I argued that. I was in that jury trial. That verdict form tracks this. It was a special interrogatory where the jury could find a pre-existing condition, assign a percentage, where the Court, as a matter of law, reduced the amount of damages. And in that case they said because he had a degenerative disc condition in his lumbar spine, and without having to express any mathematical certainty, that was sufficient to go before the jury, and entitled a special verdict form which was approved by the 10th Circuit Court of Appeals.

THE COURT: All right. I'm going to give Special Verdict Form B, as modified, as the second jury verdict form. It seems to me the other issues we can reserve for argument once the verdict comes back. It may or may not be applicable.

MR. JACKSON: May I just—for clarification, Your [44] Honor?

THE COURT: Yes.

MR. JACKSON: Is—is the proffer of defendant's verdict form a form that was approved by the 10th Circuit in the Sower case?

MR. MARTINEZ: The special—the use of special interrogatories as it relates to sole negligence, contributory negligence, the pre-existing condition, it did not have the issue of mitigation of damages in that case. Mitigation of damages was not an issue before the Sower court.

One thing to be—in all fairness to plaintiff's counsel, Judge, you had asked in Special Verdict Form A and B, the—if any language—

THE COURT: Right.

MR. MARTINEZ: —or no matter how small language. My verdict form does not incorporate that. And to the extent we need to modify so that it's consistent, I want to be fair with that.

MR. JACKSON: Okay. Thank you. Thank you, counsel.

THE COURT: Okay.

MR. JACKSON: And I will object to any verdict form that's submitted inconsistent with the Sower opinion.

THE COURT: Okay.

**APPENDIX G**

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
City and County Building
1437 Bannock Street
Denver, CO 80202

[Filed SEP. 19, 2003]

---

Case Number: 00 CV 4787
Ctrm.: 7

---

CHARLES A. NICHOLS,

*Plaintiff,*

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

*Defendant.*

---

Attorney for Plaintiff:

| | |
|---|---|
| Name: | Martin E. Jackson |
| Address: | PO Box 862 |
| | Conifer, CO 80433-0862 |
| Phone No.: | 303/816-5714 |
| Fax No.: | 303/816-5717 |
| Atty Reg#: | 31771 |

---

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

---

INTRODUCTION

The Court has requested that counsel brief issues in connection with the jury verdict form rendered to the court on September 18, 2003 in this case. Plaintiff submits this, his brief, in connection with his Motion for Entry of Judgment.

This case was tried to a jury verdict over the course of four days beginning September 15, 2003. The parties submitted various jury instructions and jury verdict forms to the court. At the charge conference, the court adopted the Defendant's proffered Jury Verdict form B, which is the form used by the jury to render its verdict. Defense counsel represented to the court that the proffered verdict form was appropriate pursuant to the case of *Sauer v. Burlington Northern Santa Fe Railroad Company*, 106 F.3d 1490 (1997) on the issue of Plaintiff's pre-existing physical conditions. The Defendant's proffered verdict form contained two questions, 6 and 7 which ask the jury to determine the "percentage of the Plaintiff's condition . . . attributable to a pre-existing condition."

Counsel for the Plaintiff objected to the use of this verdict form and instead urged the court to utilize his proffered verdict form B (Exhibit 1) which allows the jury to determine the issues of negligence and contributory negligence. Plaintiff's counsel's objections to the jury verdict form B were overruled.

After the return of the jury's verdict in the amount of $800,000,00 on September 18, 2003, the court instructed the parties that it would withhold entry of judgment on behalf of the Plaintiff until the parties had briefed the issue of the appropriate reductions to the gross verdict. The Plaintiff respectfully requests immediate entry of judgment on his behalf and against the Defendant in the amount of $560,000.00. He acknowledges that a reduction of $240,000.00 is necessary and appropriate in light of the jury's answer to Question 5, assigning 30 per cent contributory negligence to the Plaintiff. 45 U.S.C. § 53.

Apparently the only issue in dispute is how to address the jury's answers to Questions 7 and 8 in which the jury was asked to determine what percentage of the Plaintiff's condition is attributable to a pre-existing condition.

ARGUMENT

In support of this motion, the Plaintiff would show the court as follows:

1) The jury form properly distinguishes between damages attributable to "injury" and those attributable to a pre-existing condition.

Question 6 on Jury Verdict Form B, completed by the jury, asks:

> What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the ***injury?***
>
> ANSWER: $800,000.00.

The questions 7 and 8 address the pre-existing condition issues. The form does not request the jury to make a reduction of damages for any pre-existing condition, it simply requests, in Question 8 for the jury to determine

> [W]hat percentage of the Plaintiff's condition is attributable to a pre-existing condition, if any?
>
> Answer: 70%

This is an ambiguity in the form, to be sure, but this form was proffered by the Defendant, over Plaintiff's objections. In fairness to the Plaintiff, such ambiguities should be resolved in favor of the Plaintiff, especially in an F.E.L.A. case where the law explicitly favors a recovery by an injured worker once railroad negligence has been proven.

More importantly, this verdict form is not the same as the one used in *Sauer*, so reliance upon that opinion by the Defendant is misplaced. This was the basis of one of Plaintiff's counsel's objections to the submission of this particular

verdict form. In *Sauer*, although not reproduced in the opinion, the court does describe the forms:

> The special verdict forms submitted to the jury asked for the percentage of damages from each of the two accidents attributable to preexisting conditions or prior accidents. The jury found BN was negligent only in the second accident and found 75 percent of Sauer's damages were attributable to preexisting conditions or prior accidents.

106 F.3d at 1494.

The form submitted to the jury in Mr. Nichols' case does not ask the jury to determine the percentage of damages attributable to pre-existing conditions. Question 7 asks for the jury to decide what percentage of Plaintiff's ***condition***, is attributable to a ***pre-existing condition***. It does not, as in *Sauer*, ask for a determination of what "percentage of *damages* from each of the two accidents [was] attributable to pre-existing conditions or prior accidents." Ibid [*sic*]. The distinction between physical condition and damages is not metaphysical and should have been explained clearly to the jury if it was the Defendant's intention to have the verdict reduced based on the amount of damages which the jury believed was attributable to pre-existing conditions.

Because the jury decided that 70 percent of the Plaintiff's "***condition***" was attributable to pre-existing factors, it must be assumed from a plain reading of the jury verdict form that they attributed 30 percent of his "condition" to the physical conditions caused by the accident. The jury found the Defendant negligent in causing the accident. They found in Question 6 that the amount of $800,000.00, without reduction for his own negligence, would fairly and adequately compensate him for "***the injury***." The logical reading of the intent of the jury, given the nature of this form, is that the jury assigned a value of $800,000.00 to the 30 percent of the "con-

dition" which was not attributable to pre-existing conditions, that is, the ***injuries*** caused by the accident complained of in this lawsuit.

Questions 7 and 8 do not address damages in any way.

2) The holding in *Sauer*, does not approve a particular verdict form. It does instruct, as indicated above, that the jury may determine the percentage of damages attributable to pre-existing conditions. *Sauer* is essentially concerned with whether there was sufficient evidence to submit an apportionment instruction. The significance of the case is chiefly that expert witnesses are not necessary to provide a basis for the jury to apportion damages. The verdict form in Mr. Nichols' case did not request that the jury apportion damages based upon a pre-existing condition. Counsel has been unable to find any F.E.L.A. case other than *Sauer* where such an [*sic*] verdict form was used and has found no case whatsoever in which a verdict form similar to the one proffered by the Defendant and used in this case was addressed by any court.

3) Jury Instruction 28, given by the court to the jury in this case provides, in relevant part, that:

> If you find that all of these three statements have been proved by a preponderance of the evidence, it is your duty to determine, if possible, the amount of damages, if any, caused only by the negligence of the defendant.

This is the only instruction regarding pre-existing conditions given to the jury. The jury is clearly told to determine the amount of ***damages*** caused only by the Defendant's negligence. They are not told to determine damages and then make a reduction for pre-existing conditions. They are to consider the pre-existing conditions in determining the amount of the damages and make their answer to question number 6 accordingly. It must be assumed that if the jury followed these instructions, that they accounted for preexisting injuries in arriving at their damage award.

If the jury followed this instruction, as must be assumed, the answers to questions 7 and 8 can only be viewed as informative regarding their perceptions of the contribution of the accident to the Plaintiff's physical condition, but can in no way be construed to relate to their determination of damages as they were instructed in number 28. Questions 7 and 8 do not require the jury to determine an amount of damages attributable to the injury or to a pre-existing condition.

4) It is anticipated that the BNSF will argue that the inclusion of questions 7 and 8 is meaningless if some reduction is not made to the verdict based on the answers to these questions. If that was the intent of the jury verdict form proffered by the Defendant, it should have been crafted to achieve that result. It was not the Plaintiff who proffered this form. The jury verdict form does not comply with the holdings in *Sauer* and extreme prejudice would result to the Plaintiff if a reduction is made as proposed by the Defendant. This would essentially result in a double credit for the pre-existing conditions found to be present by the jury.

5) If judgement is not entered on behalf of the Plaintiff as requested in this motion, there is no rational method of determining exactly what the net award to the Plaintiff should be because the jury was not asked to determine what portion of his damages was attributable to his condition, only what portion of his condition was attributable to a preexisting condition. They were clearly instructed that they were to award only damages attributable to the negligence of the defendant. This they have done.

WHEREFORE, Plaintiff respectfully requests immediate entry of judgment on his behalf in the amount of $560,000.00, exclusive of costs and other items to which he may be justly entitled.

BY: /s/ Martin E. Jackson
MARTIN E. JACKSON
Attorney for Plaintiff Charles A. Nichols

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
City and County Building
1437 Bannock Street
Denver, CO 80202

---

Case Number: 00 CV 4787
Ctrm.: 7

---

CHARLES A. NICHOLS,

*Plaintiff,*

v.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

*Defendant.*

---

Attorney for Plaintiff:

| | |
|---|---|
| Name: | Martin E. Jackson |
| Address: | PO Box 862 |
| | Conifer, CO 80433-0862 |
| Phone No.: | 303/816-5714 |
| Fax No : | 303/816-5717 |
| Atty Reg#: | 31771 |


---

**SPECIAL VERDICT FORM B**

---

DO NOT ANSWER THIS SPECIAL VERDICT FORM IF YOUR FOREPERSON HAS COMPLETED, AND ALL JURORS HAVE SIGNED, SPECIAL VERDICT FORM A.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the Plaintiff have injuries, damages, and losses? (Yes or No)

   ANSWER: _____

2. Was the Defendant negligent? (Yes or No)

   ANSWER: _____

3. Was the Defendant's negligence, if any, a cause of any of the injuries, damages, or losses claimed by the Plaintiff? (Yes or No)

   ANSWER: _____

4. Was the Plaintiff negligent? (Yes or No)

   ANSWER: _____

5. Was the Plaintiff's negligence, if any, a cause of his own claimed injuries, damages, and losses? (Yes or No)

   ANSWER: _____

6. What amount do you find and without any reduction will fairly and adequately compensate Plaintiff for the injuries, damages, and losses caused by Defendant's negligence? You should answer "0" if you determine there were none.

   ANSWER: $_____

Answer the following question #7 only if your answer to all five #1, #2, #3, #4 and #5 is "yes."

7. Taking as 100% the combined negligence of the Defendant and the Plaintiff that caused the Plaintiff's injuries, damages, and losses, what percentage of the negligence was the Defendant's and what percentage was the Plaintiff's.

   ANSWER:

   Percentage charged to Defendant: _____%

   Percentage charged to Plaintiff _____%

Must total 100%

| | |
|---|---|
| _____ | _____ |
| Foreperson | |
| _____ | _____ |
| _____ | _____ |
| _____ | |

## APPENDIX H

### INSTRUCTION NO. 1

These instructions contain the law that you must use in deciding this case. No single instruction states all the applicable law. All the instructions must be read and considered together.

You must not be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law should be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

The Court does not, by these instructions, express any opinions as to what has or has not been proved in the case, or to what are or are not the facts of the case.

### INSTRUCTION NO. 2

I will now explain the claims and defenses of each party to the case and the law governing the case. Please pay close attention to these instructions. These instructions include both general instructions and instructions specific to the claims and defenses in this case. You must consider all the general and specific instructions together. You must all agree on your verdict, applying the law, as you are now instructed, to the facts as you find them to be.

The parties to this case are: Charles A. Nichols, the Plaintiff and Burlington Northern Railway Company, the Defendant.

The Plaintiff claims: On November 7, 1999 Plaintiff sustained injuries and losses as a result of Defendant's negligence.

The Defendant denies it was negligent. As affirmative defenses, the Defendant claims that Plaintiff was solely or contributorily negligent. Any injuries or losses are a result of

Plaintiff's sole negligence. Further, Defendant alleges that Plaintiff failed to mitigate his damages

These are the issues you are to decide.

INSTRUCTION NO. 3

In addition to denying that any negligence of the Defendant caused any injury or damage to the Plaintiff, the Defendant alleges, as a further defense, that some contributory negligence on the part of the Plaintiff himself was a cause of any injuries and consequent damages Plaintiff may have sustained. Contributory negligence is fault on the part of a person injured, which cooperates in some degree with the negligence of another, and so helps to bring about the injury.

By the defense of contributory negligence, the Defendant in effect alleges that, even though the Defendant may have been guilty of some negligent act or omission which was one of the causes, the Plaintiff himself, by his own failure to use ordinary care under the circumstances for his own safety, at the time and place in question, also contributed one of the causes of any injuries and damages Plaintiff may have suffered.

The burden is on a Defendant, alleging the defense of contributory negligence, to establish, by a preponderance of the evidence in the case, the claim that the Plaintiff himself was also at fault, and that such fault contributed one of the causes of any injuries and consequent damages Plaintiff may have sustained.

INSTRUCTION NO. 4

If you find that the Plaintiff was negligent, and that Plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of the Defendant.

INSTRUCTION NO. 5

In order for Plaintiff to recover in this case, he must prove by a preponderance of the evidence that any injury he sus-

tained was the result of the negligence of the Defendant. You must not speculate in this respect. It is not sufficient for Plaintiff to show that such condition could have been caused by the alleged accident. Defendant is not to be held responsible for any ailments which Plaintiff may suffer which resulted from any cause other than the accident mentioned in the evidence. Any physical disability which you find to be attributable to any prior or subsequent accident or illness and which is not a direct result of the accident complained of is not a part of this action and should not be considered by you.

INSTRUCTION NO. 6

You are instructed that if an employee has a choice of ways to doing a particular job in the course of his employment, one way involving danger and risk of injury to himself and another way that is safe or less dangerous, and he voluntarily chooses the unsafe or more dangerous way, then the employee may be deemed negligent, if the risk of injury was obvious and such as a man of ordinary prudence would have avoided.

INSTRUCTION NO. 7

The occurrence of an accident does not raise any presumption of negligence on the part of either the Plaintiff or the Defendant.

The mere fact that an accident happened, standing alone, does not, unless otherwise expressly stated, permit the jury to draw the inference that the accident was caused by anyone's negligence.

INSTRUCTION NO. 8

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damages suffered by the Plaintiff, you may find that such

injury or damage was legally caused by the Defendant's act or omission.

Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such cause occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the claim under the FELA for negligence, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support the claim, you will then consider the defense raised by the Defendant.

INSTRUCTION NO. 9

The negligence, if any, of the Defendant, Burlington Northern Santa Fe Railway Company, is not a cause of any injuries, damages and losses to the Plaintiff, Charles A. Nichols, unless injury to a person in the Plaintiff's situation was a reasonably foreseeable consequence of that negligence. The exact or precise injury need not have been foreseeable, but it is sufficient if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the Plaintiff's situation might result from the Defendant's conduct.

INSTRUCTION NO. 10

It was the continuing duty of the Defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances, in furnishing the Plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances to maintain and keep such place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see

that the place in which the work is to be performed is reasonably safe, under the circumstances shown by the evidence in the case.

INSTRUCTION NO. 11

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property.

"Ordinary care" is that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger known to be involved in what is being done, it follows that the amount of caution required, in the use of ordinary care will vary with the nature of what is being done, and all the surrounding circumstances shown by the evidence in the case. To put it another way, as the danger that should reasonably be foreseen increases, so the amount of care required by the law also increases.

INSTRUCTION NO. 12

In order to prove the essential element of Plaintiff's claim, the burden is on the Plaintiff to establish, by a preponderance of the evidence in the case, the following facts:

First, that the Defendant was negligent in one or more of the particulars alleged; and

Second, that the Defendant's negligence caused or contributed to some injury and consequent damage sustained by the Plaintiff.

On the other hand, if you should find: (1) that the Defendant was not negligent; or (2) that the Defendant was negligent, but such negligence was not a cause of injury or damage sustained by the Plaintiff, then your verdict should be for the Defendant.

INSTRUCTION NO. 13

In this case the Plaintiff's claims are asserted under the Federal Employers' Liability Act. The Federal Employers' Liability Act provides, in part, that:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . or by reason of any defect or insufficiency, due to its negligence in its . . . appliances . . . track . . . or other equipment."

In order to prevail on this claim, the Plaintiff must prove each of the following elements by a preponderance of the evidence:

(1) That the Defendant was "negligent" as claimed by the Plaintiff; and,

(2) That such negligence was a "legal cause" of damage sustained by the Plaintiff.

INSTRUCTION NO. 14

Certain testimony has been read into evidence from a transcript of an earlier proceeding. The transcript is testimony taken under oath at the earlier proceeding and preserved in writing. You are to consider that testimony as if it had been given before you from the witness stand.

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given by the witness from the witness stand.

INSTRUCTION NO. 15

The weight of evidence is not necessarily determined by the number of witnesses testifying to a particular fact.

You must not be influenced by sympathy, bias, or prejudice for or against any party in this case.

The lawyers have highlighted certain parts of some exhibits. However, it is for you to determine the significance of the highlighted parts.

INSTRUCTION NO. 16

You have heard the parties stipulate or agree to the existence of a fact or that a fact has been admitted. This agreement makes the presentation of any evidence to prove this fact unnecessary. The agreement means that you must accept these facts as true.

INSTRUCTION NO. 17

Any finding of fact you make must be based on probabilities, not possibilities. You should not guess or speculate about a fact.

The evidence in the case consists of the sworn testimony of all the witnesses and all exhibits which have been received in evidence.

In deciding the facts, you must consider only the evidence received at trial. Evidence offered at the trial and rejected or stricken by the Court must not be considered by you. Statements, remarks, arguments, and objections by counsel and remarks of the Court not directed to you are not evidence.

You are to consider only the evidence in the case and the reasonable inferences from that evidence. An inference is a deduction or conclusion, which reason and common sense lead the jury to draw from other facts that have been proved.

Evidence may be either direct or circumstantial. Circumstantial evidence is the proof of facts or circumstances from which the existence or nonexistence of other facts may reasonably be inferred. All other evidence is direct evidence. The law makes no distinction between the effect of direct evidence and circumstantial evidence.

INSTRUCTION NO. 18

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony; their motives; whether their testimony has been contradicted or supported by other evidence; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

A witness qualified as an expert by education, training, or experience may state opinions. You should judge expert testimony just as you would judge any other testimony. You may

accept it or reject it, in whole or in part. You should give the testimony the importance you think it deserves, considering the witness's qualifications, the reasons for the opinions, and all of the other evidence in the case.

Based on these considerations, you may believe all, part or none of the testimony of a witness.

INSTRUCTION NO. 19

1. The Plaintiff has the burden of proving his claims by a preponderance of the evidence.

2. The Defendant has the burden of proving each of his affirmative defenses by a preponderance of the evidence.

3. To prove something by a "preponderance of the evidence" means to prove that it is more probably true than not.

4. "Burden of proof" means the obligation a party has to prove his claims or defenses by a preponderance of the evidence. The party with the burden of proof can use evidence produced by any party to persuade you.

5. If a party fails to meet its burden of proof as to any claim or defense or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must reject that claim or defense.

INSTRUCTION NO. 20

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with as equals in the court of justice.

INSTRUCTION NO. 21

Since a corporation can act only through its officers, or employees, or other agents, the burden is on the Plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of the Defendant other than the Plaintiff himself was a cause of any injuries and consequent damages sustained by the Plaintiff.

Any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of his duties, is held in law to be the negligence of the corporation.

INSTRUCTION NO. 22

Defendant alleges that, at the time and place in question, Plaintiff was guilty of contributory negligence in the following particulars:

1. Failed to use equipment which was readily available for use.

2. Failed to wait for assistance which was readily available.

3. Failed to use established methods of loading equipment onto a locomotive.

4. Failed to acknowledge his own physical abilities when loading equipment onto the locomotive.

5. Failed to take time to work safely.

INSTRUCTION NO. 23

Section 3 of the Federal Employers' Liability Act, 45 U.S.C.A. §53, provides in part that:

> In all actions . . . brought against any . . . common carrier by railroad . . . to recover damages for personal injuries to an employee, . . . the fact that the employee

may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

So, if you should find, from a preponderance of the evidence in the case, that the Defendant was guilty of negligence which caused, in whole or in part, any injury or damage to the Plaintiff; and should further find, from a preponderance of the evidence in the case, that the Plaintiff himself was guilty of contributory negligence which contributed toward bringing about all or part of his own injury; then the total award of damages to the Plaintiff will be reduced by the court by an amount equal to the percentage of fault or contributory negligence chargeable to the Plaintiff.

INSTRUCTION NO. 24

The proper procedure to be followed by the jury in comparing the negligence of the parties and returning a verdict in favor of the Plaintiff for a reduced amount based upon that comparison, is: first, determine the full amount of all damages sustained by the Plaintiff, as a proximate result of the accident; next, compare the negligence or fault of the parties by determining in what proportion, figured in percentage, Plaintiff's own fault contributed as a proximate cause of all damages suffered by the Plaintiff, as a proximate result of the accident; the Court will then reduce the full amount of Plaintiff's damages, by subtracting a sum equal to the percentage of the total you find, from a preponderance of the evidence in the case, was caused by Plaintiff's contributory negligence.

INSTRUCTION NO. 25

If you find that the Plaintiff, Charles A. Nichols, has had actual damages, then you must consider whether the Defendant, Burlington Northern Santa Fe Railway Company, has proved its affirmative defense of Plaintiff's failure to mitigate

or minimize damages. The Plaintiff has the duty to take reasonable steps under the circumstances to mitigate or minimize his damages. Damages, if any, caused by Plaintiff's failure to take such reasonable steps cannot be awarded to the Plaintiff.

This affirmative defense is proved if you find all of the following have been proven by a preponderance of the evidence:

1. That the Plaintiff was physically able to look for appropriate work, and;
2. That Plaintiff had increased damages because he had not sought alternative employment or attempted to further his education.

If you find that any one or more of these propositions has not been proved by a preponderance of the evidence, then you shall make no deduction from Plaintiff's damages.

On the other hand, if you find that these propositions have been proved by a preponderance of the evidence, then you must determine the amount of damages caused by the Plaintiff's failure to take such reasonable steps.

INSTRUCTION NO. 26

The Defendant railroad has a duty to exercise reasonable care so as not to aggravate a known weakened physical condition or disability in an employee by assigning that employee work which the Defendant knows, or in the exercise of reasonable care should know, would aggravate or cause injury to such employee because of the known weakened physical condition or known disability.

INSTRUCTION NO. 27

An unemployed plaintiff who is able to look for work does not satisfy his duty to mitigate by waiting passively for employment to be offered. The opportunity to mitigate is not

merely the opportunity to accept a job, but the opportunity so seek appropriate work when one is able to do so.

INSTRUCTION NO. 28

For the Plaintiff, Charles A. Nichols, to recover damages for the aggravation of a preexisting condition, you must find all of the following have been proved:

1. Before November 7, 1999, the Plaintiff had preexisting condition in his right knee and lower back.

2. On November 7, 1999, the Defendant, Burlington Northern Santa Fe Railway Company, was negligent.

3. The Defendant's negligence made the Plaintiff's condition worse.

If you find that all of these three statements have been proved by a preponderance of the evidence, it is your duty to determine, if possible, the amount of damages, if any, caused only by the negligence of the Defendant.

If you are able to separate the amount of damages, if any, caused by the negligence of the Defendant from the amount of damages, if any, caused by the ailment or disability which existed before November 7, 1999, then the Plaintiff is entitled to recover damages caused only by the negligence of the Defendant.

If you are unable to separate the damages caused by the ailment or disability which existed before November 7, 1999 and the damages caused by the negligence of the Defendant, then the Defendant is legally responsible for the entire amount of damages.

INSTRUCTION NO. 29

If you should find that the Plaintiff is entitled to a verdict, and further find that the evidence in the case establishes either: (1) a reasonable likelihood of future medical expense,

or (2) a reasonable likelihood of loss of future earnings, then it becomes the duty of the jury to ascertain the present worth in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the Plaintiff will in effect be reimbursed in advance of the loss, and so will have the use of money which he or she would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump sum payment of anticipated future loss, the law requires that the jury discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which the Plaintiff could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present worth—the reduced amount—of anticipated future loss.

INSTRUCTION NO. 30

If you should find that the Plaintiff is entitled to a verdict, in arriving at the amount of the award, you should include:

**First**, loss of earnings, if any, shown by the evidence in the case to have been necessarily lost up to date by the Plaintiff since the injuries, because of being unable to pursue his occupation, as a result of the injuries.

**Second**, also such sum as will reasonably compensate the Plaintiff for any future wage loss or impairment of earning capacity caused by the injuries in question, which you find

from the evidence in the case that Plaintiff is reasonably probable to suffer in the future. In determining this amount, you should consider what Plaintiff's health, physical ability and earning power were before the incident and what they are now; the nature and extent of his injuries, whether or not they are reasonably probable to be permanent; or if not permanent, the extent of their duration; all to the end of determining, first, the effect, if any, of his injuries upon his future earning capacity, and second, the present value of any impairment of earning capacity or future wage loss, which you find from the evidence in the case that Plaintiff is reasonably probable to suffer in the future, as a result of the injuries in question.

INSTRUCTION NO. 31

At the beginning of this trial, Plaintiff Charles A. Nichols, had a life expectancy of 35.2 years. This expectancy is taken from the tables of life expectancy which are part of the Colorado law. This table of life expectancy is not conclusive but may be considered together with other evidence relating to the Plaintiff's health, habits and occupation.

INSTRUCTION NO. 32

The fact that an instruction on measure of damages has been given to you does not mean that the Court is instructing the jury to award or not to award damages. The question of whether or not damages are to be awarded is a question for the jury's consideration.

Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your best judgment based on the evidence.

INSTRUCTION NO. 33

Damages must be reasonable. If you should find that the Plaintiff is entitled to a verdict, you may award him only such damages as will reasonably compensate him for such injury

and damage as you find, from a preponderance of the evidence in the case, that he has sustained as a proximate result of the accident.

You are not permitted to award speculative damages. So, you are not to include in any verdict compensation for any prospective loss which, although possible, is not reasonably certain to occur in the future.

INSTRUCTION NO. 34

If you find for plaintiff you should compensate him for any bodily injuries and any resulting mental and physical pain and suffering, mental anguish, disability, impairment of ability to enjoy life, impairment of self-esteem or self-image experienced in the past and which you find from the evidence that he probably will suffer in the future from the injuries in question. No evidence of the value of such intangible things as mental and physical pain and suffering, mental anguish, impairment of ability to enjoy life or impairment of self-esteem has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the plaintiff for the damages he has suffered. There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in the light of the evidence.

INSTRUCTION NO. 35

If your verdict is for Plaintiff it should include the reasonable value of hospitalization, medical care, treatment, and vocational rehabilitation expenses necessarily or reasonably to be obtained by the Plaintiff in the future.

INSTRUCTION NO. 36

In considering the amount of damages, if any, to be awarded, you are instructed that any recovery by the Plaintiff in this action will not be subject to federal or state income taxes.

INSTRUCTION NO. 37

Once you begin your deliberations, if you have a question about the evidence in this case or about the instructions or verdict forms that you have been given, your Foreperson should write the question on a piece of paper, sign it and give it to the bailiff, who will bring it to me.

I will then confer with the attorneys as to the appropriate way to answer your question. However, there may be some questions that, under the law, I am not permitted to answer. If it is improper for me to answer the question, I will tell you. Please do not speculate about what the answer to your question might be or why I m [*sic*] not able to answer a particular question.

INSTRUCTION NO. 38

The original form of the written instructions and the exhibits are a part of the court record. Do not place any marks or notes on them.

The bailiff will now escort you to the jury room. After you get to the jury room you shall select one of your members to be the foreperson of the jury. That person will be in charge of your discussions. You must all agree on your verdict, and you must all sign the original form of whatever verdict you reach.

Please notify the Bailiff when you have reached a verdict, but do not tell the Bailiff what your verdict is. You shall keep the verdict form, these instructions and the exhibits until I give you further instructions.

**APPENDIX I**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed Oct. 14, 1994]

---

No. 93-CB-854

---

STEVEN V. SAUER,
*Plaintiff,*

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a Delaware Corporation,
*Defendant.*

---

SPECIAL VERDICT FORM ONE

---

First Cause of Action: January 6, 1992.

QUESTION NO. 1: Was the Defendant negligent?

ANSWER: No (yes or no)

If your answer is "no", your verdict is for the Defendant. Your Foreman/Forewoman should date and sign the Verdict Form below and you should notify the bailiff that you have reached a verdict.

QUESTION NO. 2: If your answer to Question No. 1 was "yes," did that negligence have some causal connection, in whole or in part, with the Plaintiff's injuries?

ANSWER: _____ (yes or no)

If your answer is "no", your verdict is for the Defendant. Your Foreman/Forewoman should date and sign the Verdict Form below and you should notify the bailiff that you have reached a verdict.

QUESTION NO. 3: If your answer to Interrogatory No. 2 is "yes," was the Plaintiff negligent?

ANSWER: Yes (yes or no)

QUESTION NO. 4: If your answer to Question No. 3 is "yes" taking as 100 percent the combined negligence of the Defendant and the Plaintiff, what percentage of the negligence was the Defendant's and what percentage was the Plaintiff's?

ANSWER: _____

Percentage charged to the Defendant: 50%

Percentage charged to the Plaintiff: 50%

MUST TOTAL 100%

QUESTION NO. 5: What amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury he received?

ANSWER: $68,904

QUESTION NO. 6: What percentage of the damages determined in Question No. 5 above are attributable to a pre-existing condition or to the Plaintiff's previous or subsequent accidents?

ANSWER: 75%

Dated this 14th day of October, 1994.

/s/ [Illegible]
Foreman/Forewoman

**APPENDIX J**

COLORADO COURT OF APPEALS
Two East 14th Avenue
Denver, Colorado 80203

---

Case No. ____

---

CHARLES A. NICHOLS,
*Plaintiff-Appellant,*

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
*Defendant-Appellee.*

---

Thomas L. Roberts, Atty. No. 5304
Laura E. Schwartz, Atty. No. 26044
Roberts Levin & Patterson, P.C.
1660 Wynkoop Street, Suite 800
Denver, CO 80202
Telephone: 303-575-9390
Facsimile: 303-575-9385
Email: tlr@rlplaw.com; les@rlplaw.com

Martin E. Jackson, Atty. No. 31771
Law Offices of Martin E. Jackson, P.C.
P.O. Box 862
Conifer, CO 80433
Telephone: 303-816-5714
Facsimile: 303-816-5717
Email: mjackson@ispwest.com

---

Appeal from the District Court, City and County of Denver
The Honorable Michael A. Martinez, Presiding
Civil Action No. 00 CV 4787

---

## NOTICE OF APPEAL

COMES NOW Plaintiff-Appellant Charles A. Nichols, by and through his attorneys, ROBERTS LEVIN & PATTERSON, P.C., and LAW OFFICES OF MARTIN E. JACKSON, P.C., and hereby submits his Notice of Appeal from the trial court's Order of Judgment reducing the jury's award of damages.

### I. NATURE OF THE CASE

**A. Nature of the Controversy.**

Plaintiff-Appellant Charles A. Nichols ("Mr. Nichols"), a locomotive engineer with over 20 years of employment with Defendant-Appellant Burlington Northern and Santa Fe Railway Company ("BNSF"), filed this action on June 30, 2000, seeking monetary damages for a cumulative traumatic injury to his neck and cervical/thoracic spine caused by his work pursuant to 45 U.S.C. § 51, *et seq.*, the Federal Employer's Liability Act ("FELA") and 49 U.S.C. § 20701, the Locomotive Inspection Act (the "LIA"), alleging that the locomotives upon which he was required to work were defective in that they were unsafe as contemplated under the LIA and caused Mr. Nichols the injuries to his cervical and thoracic spine. In addition, he made claim under FELA for separate injuries to his lumbar spine and knee sustained in a work accident which occurred on November 7, 1999 when he fell from a locomotive.

Mr. Nichols settled the cumulative trauma injury portion of his claim, and his remaining claim for damages arising out of the November 1999 work accident due to BNSF's negligence in returning him to work while unfit was tried to a jury. On September 18, 2003, the jury returned a verdict in favor of Mr. Nichols and awarded him damages of $800,000. Relying on answers to special interrogatories in a verdict form, the trial court decreased the verdict by 30% for Mr. Nichols'

contributory negligence to $560,000. The trial court then further reduced the $560,000 by another 70% to $168,000, citing the jury's response to a special interrogatory in the verdict form included in the verdict form over Mr. Nichols' objection about a pre-existing condition.

**B. Orders Appealed.**

On September 22, 2003, also over Mr. Nichols' objection, the trial court entered a written Order of Judgment reducing the jury's $800,000 award further to $164,950.86.[1] The only portion of that Order being appealed is the double reduction for a pre-existing injury, and Mr. Nichols seeks remand of this matter for reinstatement of the $560,000 damage award. Mr. Nichols also conditionally appeals several bench rulings made during trial that excluded expert testimony about his economic damages.

**C. Finality Of Judgment.**

This judgment is final for purposes of appeal pursuant to C.R.C.P. 54(a) and C.R.S. § 13-3-102. Mr. Nichols appeals from the trial court's order and invokes this Court's jurisdiction pursuant to C.A.R. 3(a) and 4(a).

**D. Post-Trial Motions.**

On September 19, 2003, BNSF filed a Brief in Regard to the Net Jury Verdict. Also on September 19, 2003, Mr. Nichols filed a Motion for Entry of Judgment. The trial court decided both motions and entered its Order of Judgment slashing the jury award on September 22, 2003, the Order now being appealed from. Mr. Nichols filed his Motion for Bill of Costs on September 30, 2003. On October 6, 2003, BNSF filed Defendant's Objection to Plaintiff's Bill of Costs to which Mr. Nichols replied on October 14, 2003. On

---

[1] The trial further reduced the jury award by an additional $3,049.14 as the result of an uncontested Amended Motion for Credits, and entered judgment against BNSF in the amount of $164,950.86. That reduction is not at issue in this appeal.

October 16, 2003, the trial court granted Plaintiff's Motion for Bill of Costs, entered judgment against BNSF, and awarded Mr. Nichols his costs in the amount of $20,029.

**E. Motions For Enlargement Of Time To File Notice Of Appeal.**

None.

## II. ADVISORY LISTING OF ISSUES TO BE RAISED ON APPEAL

A. Did the trial court err, as a matter of law, when it submitted special interrogatories to the jury concerning what percent of Plaintiff's, "*condition*" was attributable to a pre-existing condition and then reducing the amount of Plaintiff's *damages* which the jury found were caused by the November 1999 work accident?

B. Did the trial court err, as a matter of law, in reducing Plaintiff's damages by the percentage amount of his condition the jury found to be pre-existing when the presence of pre-existing injuries was an element of Plaintiffs claim already considered by the jury in determining that the Defendant was negligent in ordering that Plaintiff return to work while physically unfit for safe duty, and the jury was not instructed that any award to Plaintiff would be reduced by that percentage?

C. If the jury instructions and the Special Verdict Form were ambiguous when read together, did the trial court err in failing to find that ambiguity invited by Defendant and to resolve it in Plaintiff's favor as required by FELA and by the fact that it arose from the verdict form tendered by Defendant and submitted to the jury over Plaintiff's objection?

Only if this Court remands the case for a new trial should the following evidentiary issues be considered:

D. Did the trial court abuse its discretion in excluding testimony from Plaintiff's expert on economic damages about the value of a spousal annuity?

E. Did the trial court abuse its discretion in excluding testimony from Plaintiff's expert on economic damages as to the value of a Tier 2 defined benefit retirement plan?

F. Any other properly preserved issues that are revealed after reviewing the record.

## III. TRANSCRIPTS OF TESTIMONY

A complete transcript of the trial is necessary. The reporter is Julie Lord. The length of the transcript is estimated as 1,800 pages.

## IV. PRE-ARGUMENT CONFERENCE

Plaintiff-Appellant does not request a pre-argument conference.

## V. COUNSEL FOR THE PARTIES

Plaintiff-Appellant is represented by:

Thomas L. Roberts
Laura E. Schwartz
**ROBERTS LEVIN & PATTERSON, P.C.**
1660 Wynkoop Street, Suite 800
Denver, CO 80202
303-575-9390

Martin E. Jackson
**LAW OFFICES OF MARTIN E. JACKSON**
P.O. Box 862
Conifer, CO 80433
303-816-5714

Defendant-Appellee is represented by:

Frederick T. Martinez
**HALL & EVANS**
1200 – 17th Street, Suite 1700
Denver, CO 80202
303-628-3300

## VI. APPENDIX

The attached Appendix contains:

1. Jury Verdict entered September 18, 2003.
2. Order of Judgment dated September 22, 2003.

DATED this 5th day of November 2003.

Respectfully submitted,

**ROBERTS LEVIN & PATTERSON, P.C.**

/s/ Thomas L. Roberts
THOMAS L. ROBERTS
LAURA E. SCHWARTZ
1660 Wynkoop Street, Suite 800
Denver, CO 80202
303-575-9390

**LAW OFFICES OF MARTIN E. JACKSON, P.C.**

MARTIN E. JACKSON
P.O. Box 862
Conifer, CO 80433
(303) 816-5714

ATTORNEYS FOR PLAINTIFF-APPELLANT
CHARLES A. NICHOLS

**APPENDIX K**

COLORADO COURT OF APPEALS
Two East 14th Avenue
Denver, Colorado 80203

[Filed APR 14, 2006]

---

Case No. 2003CA2145

---

CHARLES A. NICHOLS,
*Plaintiff-Appellant and*
*Cross-Appellee,*

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
*Defendant-Appellee and*
*Cross-Appellant.*

---

Thomas L Roberts, Atty. No. 5304
Laura E. Schwartz, Atty. No. 26044
Roberts Levin & Patterson, P.C.
1660 Wynkoop Street, Suite 800
Denver, CO 80202
Telephone: 303-575-9390
Facsimile: 303-575-9385
Email: tlr@rlplaw.com
les@rlplaw.com

Martin E. Jackson, Atty. No. 31771
Law Offices of Martin E. Jackson, P.C.
P.O. Box 862
Conifer, CO 80433
Telephone: 303-816-5714
Facsimile: 303-816-5717
Email: mjackson@ispwest.com

Appeal from District Court, City and County of Denver
The Honorable Michael A. Martinez, Presiding
Civil Action No. 00 CV 4787

**PLAINTIFF-APPELLANT'S AMENDED PETITION FOR REHEARING ON THE COURT'S RULING ON THE PRE-EXISTING CONDITION ISSUE**

Judgment Affirmed—Announced: March 23, 2006
Opinion by: Judge Carparelli, Division IV
Roy and Russel, J.J., concur

COMES NOW Plaintiff-Appellant and Cross-Appellee, Charles A. Nichols ("Nichols"), pursuant to C.A.R. 40, and hereby submits his Petition for Rehearing of this Court's March 23, 2006 opinion.

**PETITION FOR REHEARING**

The panel overlooked and misapprehended points of law and facts of record in affirming the trial court's judgment that reduced the jury's damage finding of $800,000, not only by the required 30% reduction for contributory negligence, but by an additional 70%, based on the jury's answer to a question concerning what percentage of plaintiff's "condition" was attributable to a pre-existing "condition," a question that never should have been asked and the answers to which were obviously superfluous when viewed in the context of the record.

**A. In Reaching Its Decision, the Panel Overlooked the Following Undisputed Facts of Record and Points of Law.**

1. The theory on which Plaintiff's claim was tried was that the railroad acted negligently in returning Mr. Nichols to work without restrictions and resulted in the November 7, 1999 fall at work.

2. The fall aggravated a pre-existing condition causing Mr. Nichols to become permanently disabled from performing his occupation as a railroad engineer.

3. Congenital weakness in plaintiff's knee and lower back was the pre-existing "condition" aggravated by the fall.

4. Prior to the accident, the pre-existing "condition" was unknown, latent, asymptomatic and causing Mr. Nichols no harm or damages.

5. The forces of the accident, acting on the pre-existing "condition," caused Mr. Nichols to suffer severe injuries that permanently disabled him from engaging in his occupation as a railroad engineer.

6. There was no evidence of record that, absent the November 1999 fall, the pre-existing "condition" would inevitably have caused Mr. Nichols any damages at all, let alone totally and permanently disabling him from pursuing his occupation as a railroad engineer. ***Sauer v. Burlington No. Rd. Co.***, 106 F.3d 1090 (10th Cir. 1996) was thus inapposite.

7. The $800,000 awarded by the jury therefore cannot be said to include "damages" for a pre-existing "condition" because, until the accident, no damages had been sustained, and but for the accident, there would have been no damages.

8. Mr. Nichol's economic losses, alone, caused by the accident were in the range of $605,490 to $902,328.

9. Unlike Colorado state court claims, FELA places no artificial limitations on the amount a jury may award for non-economic damages.

10. Under governing United States Supreme Court law, a damage award to a FELA plaintiff is subject only to one apportionment that may result in a reduction of the award—comparative negligence of the employee. 45 U.S.C. § 53; ***Norfold & Western Ry. Co. v. Ayers***, 538 U.S. 135 (2003).

11. There is no issue as to the correctness of the instructions given to the jury.

12. The jury instructions directed the jury that any damages awarded had to be a direct result of the November 7, 1999 accident and could not include any amount attributable to a pre-existing "condition" not caused by the Defendant. Instructions Nos. 5, 23, 24, 26, 28 & 33.

13. The court must presume that the jury properly followed the instructions given. ***O'Neal v. Reliance Mort. Corp.***, 721 P.2d 1230, 1233 (Colo.App. 1986).

14. Instruction No. 24 explained to the jury how to compare the negligence of the parties should they return a verdict in favor of the Plaintiff: "*first*, determine the full amount of all damages sustained by the Plaintiff, as a proximate result of the accident . . . ."

15. Question 2 in the Verdict Form asks if the Defendant's negligence was "a cause of any of the injuries, damages or losses claimed by Plaintiff on November 7, 1999?"

16. Question 4 asks the same question as to Plaintiff's negligence: was it a "cause of any of his own claimed injuries on November 7, 1999?"

17. Question 6 asks, without regard to offset for comparative negligence, what amount "will fairly and adequately compensate the Plaintiff for the injury?" The "injury" can only be a reference to the injury sustained on November 7, 1999 in the context of these questions.

18. Question 7 asks, "what percentage of Plaintiff's condition is attributable to a pre-existing condition, if any?" It contains no reference to "damages," "causation," or to "November 7, 1999."

**B. The Panel's Opinion Did Not Reconcile the Jury's Answers to the Special Verdict Form Questions; Rather, It Reconciled What the Trial Court Did with Those Answers.**

At page 12 of the slip opinion, the panel stated that it "must attempt to reconcile a jury's answers to special verdict questions if we can do so based on the evidence and the instructions given," citing ***Kepley v. Kim***, 843 P.2d 133 (Colo.App. 1992); ***Lonardo v. Lipvac Meat Co.***, 676 P.2d 1229 (Colo.App. 1983). This is not what the panel did, however.

The instructions directed the jury to find damages only for injuries sustained in the November 7, 1999 accident caused by the railroad's negligence, exclusive of any amount for a condition not caused by the railroad. The Special Verdict Form, through Question 6 was consistent with those instructions. The answers following Question 6 were thus superfluous and should have been ignored by the trial court. ***See, e.g., Carr v. Wal-Mart Stores, Inc.***, 312 F.3d 667, 672-75 (5th Cir. 2002), *citing* ***White v. Grinfas***, 809 F.2d 1157 (5th Cir. 1987). Giving effect to the answer to questions that never should have been asked, particularly when those answers are rendered superfluous and irrelevant when considered in the context of the evidence, the instructions, and the answers to the proper questions preceding them, with all due respect, does not constitute reconciling a jury's findings, but rather, amounts to a deconstruction of the consistency of the jury's original findings.

The jury was properly instructed, and neither party objected to the instructions given. Those instructions plainly informed the jury that, in assessing the amount of damages to be awarded, no dollar amount attributable to a pre-existing condition could be included.

The evidence indisputably supported a damage award of $800,000 as compensation for the damages caused by the railroad's negligence in aggravation of Plaintiff's pre-existing but non-disabling condition. Plaintiff's counsel argued for a verdict range between $750,000 and $950,000 to compensate for those damages. Assuming that the jury followed the instructions, as the trial court and this court must, it must be concluded that the figure included no damages for a pre-existing condition.

The Court's observation, Opinion at 8-9, that if $800,000 represents damages only for aggravation of pre-existing conditions, then Plaintiff's total damages, including his pre-existing condition, must have been $2.5 million misses the mark. The pre-existing condition was asymptomatic and caused no damages. The panel improperly equated a latent and asymptomatic condition with damages.

This Court's opinion presumes that the jury did not follow the stipulated instructions given by the court and reconciled, not the answers on the verdict form, but what the trial court did with those answers. The answers in the jury verdict form, when considered in relation to the instructions as a whole and the evidence of record, are not inconsistent. The questions as to pre-existing condition and mitigation of damages should not have been on the verdict form in the first place, and once asked, the answers should have been disregarded. A refusal to reduce the damage award a second time by the 70% answer to question 8 would not have rendered the jury's findings inconsistent or ignored an essential finding.

## CONCLUSION

There was but one—and only one—finding of damages in this case for the injuries caused by the November 7, 1999 accident—$800,000 (in answer to Question 6). The answers to Questions 7 and 8 were irrelevant and superfluous in light of the previous six answers and the record in the case. Finally, interpreting what occurred below as justifying a

double reduction of Plaintiff's FELA verdict contravenes governing United States Supreme Court precedent and undermines the essential purpose of FELA's historically-recognized remedial nature.

WHEREFORE, for the reasons above stated, Plaintiff-Appellant and Cross-Appellee respectfully request this honorable court to grant his Petition for Rehearing, reconsider the decision approving a double reduction of this FELA Plaintiffs damage award, reverse the decision below and remand this matter to the trial court with directions to enter judgment for Plaintiff in the amount of $560,000, with post-judgment interest, to award costs of this appeal, and such other and further relief as the court deems proper under the circumstances.

DATED this 14th day of April 2006.

Respectfully submitted,

**ROBERTS LEVIN & PATTERSON, P.C.**

/s/ Thomas L. Roberts
THOMAS L. ROBERTS, #5304
LAURA E. SCHWARTZ, #26044
1660 Wynkoop Street, Suite 800
Denver, CO 80202
303-575-9390
tlr@r1plaw.com
les@rlplaw.com

**LAW OFFICES OF MARTIN E. JACKSON, P.C.**

Martin E. Jackson, #31771
P.O. Box 862
Conifer, CO 80433
303-816-5714
mjackson@ispwest.com

ATTORNEYS FOR PLAINTIFF-APPELLANT
CHARLES A. NICHOLS

**APPENDIX L**

COLORADO SUPREME COURT
Court Address: 2 E. 14th Avenue
Denver, CO 80203
Telephone: (303) 861-1111

---

06-SC-413

---

CHARLES A. NICHOLS,
*Petitioner*,

v.

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,
*Respondent*.

---

*Counsel for Petitioner*:

Thomas L. Roberts, Atty. No. 5304
Roberts Levin & Patterson, P.C.
1660 Wynkoop Street, Suite 800
Denver, CO 80202
Telephone: 303-575-9390
Facsimile: 303-575-9385
Email: tlr@rlplaw.com

Martin E. Jackson, Atty. No. 31771
Law Offices of Martin E. Jackson, P.C.
P.O. Box 862
Conifer, CO 80433
Telephone: 303-816-5714
Facsimile: 303-816-5717
Email: martyjackson@qwest.net

Colorado Court of Appeals
Judges Carparelli, Roy and Russell, JJ.
Case No.: 03 CA 2145

Appeal from the District Court, City and County of Denver Trial Court Judge: The Hon. Michael A. Martinez
Case Number: 00 CV 4787

## PETITION FOR CERTIORARI

COMES NOW Petitioner, Charles A. Nichols, Plaintiff-Appellant below (hereinafter "petitioner" or "plaintiff"), and petitions the Court to exercise its sound judicial discretion in favor of reviewing the published opinion issued by the Court of Appeals in this case, and AS GROUNDS THEREFOR, states the following:

### I. ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

1. Whether the decision below contravened the express terms of the Federal Employer's Liability Act, 45 U.S.C. §§ 51-59 ("FELA"), and the United States Supreme Court's governing precedent construing that Act, and deprived Petitioner of his right to trial by jury by allowing the net damage verdict below to be reduced by a second apportionment not provided for in FELA?

2. Whether the Court of Appeals erred in failing to respect the jury's only finding on damages by giving effect to answers to superfluous questions that called for irrelevant information that could not bear on the issue of damages contrary to governing Unites [*sic*] States Supreme Court precedent?

3. Whether the Court of Appeals erred in failing to adhere to the principles that a reviewing court must presume that a jury followed the instructions given, and harmonize

answers to special verdict form questions to effectuate the jury's intent?

## II. OPINION BELOW

Petitioner seeks this Court's review of the opinion below, *Nichols v. Burlington No. & Santa Fe Ry. Co.*, __ P.3d __, 2006 W.L. 774847 (Colo.App. 2006) (copy attached as **Appendix A**), entered on March 23, 2006. Petition for Rehearing was denied on May 25, 2006. Petitioner requested an enlargement of time to July 7, 2006 within which to file this Petition but misfiled that request in the court below. On June 28, 2006, Petitioner filed in this Court his motion to accept the misfiled request for enlargement or to grant the requested enlargement under C.A.R. 56. That motion remains pending.

## III. GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction to grant certiorari review of the attached opinion by authority conferred by *Colo. Const., Art. VI § 3 (1996), C.R.S. §§ 13-4-108* and *C.A.R. 49*. Petitioner seeks review of only part "II. Damages" of the decision below.

Review by certiorari is appropriate in this case. In sanctioning a second apportionment of damages, the decision is contrary to FELA's plain terms that allow only one apportionment -- for comparative negligence -- as construed by the United States Supreme Court. The decision deprived Petitioner of 70% of his verdict in violation of his Seventh Amendment right to trial by jury by giving effect to irrelevant answers not bearing on damages. If allowed to stand, the decision has the potential for creating confusion in the trial of FELA cases, not only in Colorado, but throughout the country, and could seriously undermine the Act's policy of liberal recovery. In approving the double reduction of damages, the court decided this case in a manner contrary to established principles of appellate law and FELA's remedial purposes.

## IV. STATEMENT OF THE CASE

### A. Nature of the Case.

Petitioner, an engineer employed by the Burlington Northern and Santa Fe Railway Company ("BNSF"), sustained permanently disabling injuries to his lower back and right knee in an accident on November 7, 1999 when he fell ten feet to the ground while attempting to board a locomotive for a job assignment.

In June 2000, he filed this action under FELA, stating a claim for negligent work assignment based on the November 1999 accident and a second claim for cumulative injuries to his upper back and neck.

### B. Prior Appeal.

In June 2001, the trial court granted BNSF's motion for summary judgment, dismissing plaintiff's claims as time-barred by FELA's three-year statute of limitations and plaintiff appealed.

On August 1, 2002, the Court of Appeals reversed the trial court judgment and remanded the case for trial on the merits. *Nichols v. Burlington No. & Santa Fe Ry. Co.*, 56 P.3d 106 (Colo.App. 2002).

### C. Disposition at Trial.

On September 15, 2003, plaintiff's claim for negligent work assignment (the cumulative injury claim settled prior to trial) proceeded to trial by jury.

Rejecting the standard FELA verdict form tendered by plaintiff (**Appendix B** at 4-5), the trial court, over plaintiff's objection, used Special Verdict Form B tendered by BNSF. **Appendix B** at 1-3. That form contained the following pertinent questions:

* * *

> 6. [W]hat amount do you find, without any reduction for any negligence which you may find on the Plaintiff's

part, will fairly and adequately compensate the Plaintiff for the injury?

ANSWER: $800,000

7. [I]s all or part of Plaintiff's *condition* attributable to a *pre-existing condition*?

ANSWER: yes

8. [W]hat percentage of Plaintiff's *condition* is attributable to a *pre-existing condition*?

ANSWER: 70%

9. Did Plaintiff fail to mitigate his *damages*?

ANSWER: No

10. [W]hat amount of . . . *damages* expressed in dollars *as determined in response to Question No. 6* do you find could have been avoided . . . had [Plaintiff] taken reasonable steps to mitigate his *damages*?

ANSWER: [none] (line left blank)

**App. B** at 3. Questions 7-10 were superfluous to the questions of liability and damages.

On September 18, 2003, the jury found in favor of plaintiff, apportioning negligence 70% to BNSF and 30% to Plaintiff. The jury awarded damages of $800,000 without reduction for comparative negligence. The trial court declined plaintiff's request that judgment enter on the verdict in the net amount of $560,000, discharged the jury, and directed the parties to brief the issue as to whether the jury's award should be reduced only by the 30% comparative finding or also by the 70% answer to Question 8.

On September 22, 2003, the trial court issued its order (**Appendix C**) denying plaintiff's written motion for judgment, and after reducing the damage award by 30% for comparative negligence, reduced that net amount by 70%

based on the answer to Question 8. Relying on *Sauer v. Burlington No. R. Co.*, 106 F.3d 1490 (10th Cir. 1996), the court concluded that not to reduce the award again would ignore the jury's "complete findings." This appeal ensued seeking entry of judgment in the full net amount of $560,000.

**D. The Decision As To Which Review Is Sought.**

Though recognizing that the combination of the instructions and the "special verdict form are not models for future use," the court below concluded that the reduction in damages based on Questions 7 and 8 was not error. **App. A** at 12. The court, in what it termed, an attempt to reconcile the answers based on the record and the instructions, concluded that "the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the railroad's negligence or for pre-existing conditions." **App. A** at 13. This finding rested on the placement of the pre-existing apportionment question (following the total damage question) and rejection of the argument that the $800,000 number represented the damages caused only by the railroad's negligence, reasoning that if such were the case, then the jury's assessment of total damages must have been $2.5 million. Finding that the record could not sustain any award over $1 million, the court reiterated its finding that "the jury did not adjust the compensation amount reflected in the response to question six based on its determination of the relative effect of pre-existing conditions and the railroad's negligence." **App. A** at 14.

## V. ARGUMENT

The decision below is contrary to FELA's plain terms as construed by the United States Supreme Court. The reduction of damages by a second apportionment was contrary to the instructions given, the evidence, and established appellate principles. The Court of Appeals sanctioned prohibited fact finding when it determined that 70% of the jury's finding of

total damages in answer to Question 6, contrary to the instructions and the question itself, included an amount for pre-existing damages. By reducing the jury's only finding on the issue of damages a second time, the lower court deprived Petitioner of his full award, and violated his Seventh Amendment right to trial by jury. These errors warrant this Court's exercise of its power to honor the properly instructed jury's only damage finding and afford Petitioner the judgment to which he is entitled.

**A. FELA Permits Only One Apportionment That Can Reduce Damages Awarded under FELA—Comparative Negligence.**

Questions concerning damages awarded under FELA involve substantive rights and are resolved under federal law. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988). Judicial determinations touching on damages are resolved under the "federal common law of negligence under FELA, informed by reference to the evolving common law." *Ayers*, 538 U.S. at 145 (*citing Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 558 (1994).

This matter squarely presents the issue of whether FELA damage awards can be reduced by any apportionment other than that expressly required by the statute—for contributory negligence. The Supreme Court answered this question with a resounding "no" in *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 161 (2003), holding that *45 U.S.C. § 53* directs "apportionment of responsibility between employer and employee based on comparative fault. The statute *prescribes no other apportionment*." (citation omitted; italics added).

FELA is a remedial statute that should be liberally construed to shift "part of the 'human overhead' of doing business from employees to their employers." *Ayers*, 538 U.S. at 145. FELA's remedial nature facilitates recovery under a

liberal standard for establishing liability. *Stevens v. Bangor & Aroostook R. Co.*, 97 F.3d 594, 597-78 (1st Cir. 1996). The employer must pay for damages "whenever the negligence of the employer plays any part in causing such injuries." *Herrera v. San Luis Cent. R. Co.*, 997 P.2d 1238, 1240 (Colo. App. 1999) (*citing Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500 (1957)).

In Part III of the *Ayers* decision, a unanimous Court held that a railroad worker is entitled to all damages proximately caused by a railroad's negligence and that reducing damages by apportionment of fault to other tortfeasors is impermissible: "Nothing in the statutory text instructs that the amount of damages payable by a liable employer bears reduction when the negligence of a third-party also contributed in part to the injury-in-suit." *Ayers*, 538 U.S. at 160. "[T]o narrow employer liability" by allowing a further reduction in damages is "both unprovided for by the language of the FELA and inconsistent with the Act's overall recovery facilitating thrust." *Id.* at 161.

The fact that *Ayers* dealt with a railroad's claim of a right to reduce FELA damages by negligence apportioned to nonparties (as opposed to preexisting conditions) does not detract from the opinion's governance of the issue at hand. "[T]he parallel between aggravation of a pre-existing condition and the harm caused by multiple tortfeasors has been drawn by several courts." *Stevens v. Bangor & Aroostook R. Co.*, 97 F.3d 594, 602 fn.9 (1st Cir. 1996). The *Ayers* opinion is clear: no other reduction except that expressly permitted by the statute is allowed. Damage awards are made by taking preexisting conditions, if any, into account before an amount is reached, not by a second apportionment. Courts have approved rejection of verdict forms containing questions like those at issue here. In *Norfolk So. Ry. Co. v. Bradley*, 772 So.2d 1147 (Ala. 2000), the court recognized that to ask the jury to assess the amount of damages that would fairly

compensate the plaintiff for his injuries and then to assess a percentage of those injuries to preexisting conditions or to other unrelated accidents would be confusing, misleading, and "inconsistent and present an incorrect basis for determining damages," *id.* at 1152, a particularly true statement when the jury is specifically charged (as it was here) that it could award only damages proximately caused by the railroad's negligence and could not include any amount for preexisting conditions or separate accidents.

In *Worthy v. Norfolk & Western Ry. Co.*, 619 N.E.2d 1371, 1375-76 (Ill. App. 1993), the court approved rejection of a jury question calling for a percentage apportionment of damages to preexisting conditions. The court recognized that while "at first glance" such questions may "appear to relate to the issue of aggravation, taken as a whole, they relate to the issue of reduction of damages." *Id.* Noting that the function of such special interrogatories is "to check the jury's understanding of the case by comparing the verdict to its conclusions with the ultimate facts," the court concluded that the rejected "questions did not fill that purpose and were properly rejected by the trial court." *Id.*

To allow the decision below to stand will cause confusion in the trial of FELA cases, not just in Colorado, but throughout the country. This Court, following *Ayers*, should take this opportunity, consistent with the letter and spirit of FELA and *Ayers*, to disapprove any apportionment question other than one for comparative negligence.

### B. The Court Below Disregarded the Jury's Only Damage Finding Contrary to Governing Law.

In *Gallick*, 372 U.S. 108, the Supreme Court granted certiorari review of a state appellate decision "to consider the question whether the decision below [setting aside a jury verdict in favor of plaintiff due to insufficient evidence on causation] improperly invaded the jury's function." *Id.* at 109.

Based on answers to 24 special interrogatories, the trial court entered judgment for the plaintiff for injuries arising out of an insect bite. The bite caused a wound that became infected; unresponsive to treatment, the infection spread throughout plaintiff's body leading to amputation of his legs. *Id.* Based on two "no" answers as to whether the railroad should have foreseen an injury of this type, the state appeals court set aside the verdict because the evidence was based on guesswork, speculation, and was too tenuous to support a finding of liability. *Id.*

Recognizing that reasonable forseeability of harm is a necessary element of liability under FELA, the Supreme Court nonetheless concluded that, despite the negative answers, the forseeability requirement had "been satisfied in the present case by the jury's finding . . .," *id.* At 117-18, declaring that:

> But it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them: 'Where there is a view of the case that makes the jury's answers to special interro gatories consistent, they must be resolved that way'. We therefore must attempt to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's special verdict and remand the case for a new trial.

*Id.* at 119 (citations omitted). The Court reversed the appellate decision as "depriving petitioner of the judgment entered upon the special verdict of the jury," *id.* at 122. Because FELA law allows recovery of damages where a railroad is liable if its negligence played even the "slightest part" in causing injury and permits compensation "for even the improbable or unexpectedly severe consequences," the Court concluded that the negative answers were not controlling. *Id.* at 120.

Second, based on an instruction to take the railroad's past experience into account and the fact that it was not aware of any previous occurrence, the Court observed that the jury may have concluded that the defendant had no reason to anticipate the injury and therefore applied "too narrow a concept of foreseeable harm" to preclude its finding of negligence under FELA. *Id.* at __. Looking at the negative answers in the context of "the charge and the total context of the special verdict," the Court concluded that these immaterial answers could not be assigned "sufficient weight to warrant overturning the judgment of the trial court entered pursuant to the jury's special verdict." *Id.*

This Court cited *Gallick* with approval in *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (1982), holding that "[a]n appellate court has duty to attempt to reconcile the jury's answers to special verdicts if it is at all possible." Where the record supports a view of the case that make a jury's answers consistent, the answers must be reconciled that way. *Id., citing Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962).

Here, the lower court reached the opposite result by flawed reasoning. First, it proceeded on the incorrect assumption that the questions called for answers to legitimate questions and should have been asked. Second, it impliedly found the answers to Questions 6 and 8 inconsistent—*i.e.*, that they could not stand together unless the damages were reduced.

The court's attempt to reconcile the jury's answers was based on the premise that Questions 7 and 8 sought findings on an issue essential to Petitioner's proof of his claim. This begs the question by assuming that the answers to these questions were necessary to resolve a legitimate issue in the case. The court assumed that Question 8 was a statement on damages by the jury. But it was not.

This error resulted from the court's misperception of the nature of Plaintiff's claim and disregard of undisputed

evidence of record. Plaintiff's claim was based upon the railroad's negligence in returning Petitioner to work without restrictions, given its knowledge of weakness in his right hand. It was this pre-existing condition on which the claim was based. The pre-existing conditions which manifested into total disability as a result of the accident were congenital, latent, and asymptomatic conditions of which the railroad—and Petitioner—were unaware. The case presented an egg-shell plaintiff situation where more severe injuries occurred due to conditions in Petitioner's body.

Moreover, because the congenital conditions were asymptomatic, they were not the cause of any "damages" antedating the accident. The record is devoid of any evidence that the congenital conditions would inevitably have led to Petitioner's permanent disability even without the railroad's negligence.

The *Sauer* case, 106 F.3d 1490, relied on by both courts below, was wholly inapposite to the claim and factual record in this case. *Sauer* involved a pre-existing condition that would inevitably have caused plaintiff's injuries without railroad negligence. Further, the apportionment question in that case specifically referred to "damages."

"An instruction which misleads or confuses the jury amounts to error," and prejudicial error "exists when the record shows that a jury might have answered differently if a proper instruction had been given." *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375, 1378-79 (Colo. App. 1996), *cert. denied* (1996) (citations omitted). If Question 8 had referred the jury to Question 6, its answer to Question 7 would likely have been "no" with no necessity to answer Question 8. Questions 7 and 8 should not have been asked in this case.

**C. The Court of Appeals Failed to Presume that the Jury Adhered to the Instructions Given**

In reviewing a jury's verdict, an appellate court must presume that the jury followed the instructions. *O'Neal v.*

*Reliance Mort. Corp.*, 721 P.2d 1230, 1233 (Colo. App. 1986). Looking at the instant instructions and verdict form with this precept in mind leads to but one conclusion—that the answer to Question 6 constituted the jury's only finding of damages and *did not* include any amount allocable to losses for a "pre-existing condition."

The instructions directed the jury to find damages only for injuries sustained in the November 1999 accident caused by the railroad's negligence, exclusive of any amount for a condition not caused by the railroad. Question 8 makes no reference to "damages." It referred only to plaintiff's "condition" and "pre-existing condition." Compare the wording of Question 10, which expressly refers to "damages . . . as determined in response to Question No. 6." The wording of the mitigation questions which refer to "damages" makes clear that Question 8, relating only to "conditions," gave no hint that the answer to it could reduce the jury's intended award. Unlike comparative negligence, there was no instruction that advised the jury of the possible effect the answer to Question 8 could have on damages.

The Special Verdict Form, through Question 6, was consistent with those instructions, but the answers following Question 6 were superfluous to the properly instructed question of damages and should have been ignored by the trial court. *See, e.g., Carr v. Wal-Mart Stores, Inc.*, 312 F.3d 667, 672-75 (5th Cir. 2002), *citing White v. Grinfas*, 809 F.2d 1157 (5th Cir. 1987). Answers to questions that, by their express terms make no reference to "damages," are irrelevant and should not have been considered. Giving them effect in the context of the evidence, the instructions, and the answers to the proper questions preceding them, does not constitute a reconciliation of the jury's findings but rather a deconstruction of their consistency.

**D. The Actions Below Invaded the Province of the Jury and Deprived Petitioner of His Right to Trial by Jury on His FELA Claim.**

The decision below drastically undercut the only damage award made by the jury based on an immaterial answer to a superfluous question. The Supreme Court has held that a failure to respect a jury's FELA award when a view of the case would support it constitutes an invasion of the jury's province and a violation of a FELA plaintiff's Seventh Amendment right to trial by jury. *See, e.g., Gallick*, 372 U.S. 108; *Davis v. Baltimore & Ohio Ry. Co.*, 379 U.S. 671 (1965); *Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *H.T. Arnold v. Panhandle and Santa Fe Ry. Co.*, 353 U.S. 360 (1957).

The flawed analysis of the court below frustrated the jury's obvious intent to award plaintiff $560,000 in net damages. That analysis wrongly assumes that the questions should have been asked, and once asked, produced irrelevant answers. "For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic and Gult Stevedores, Inc.* at 364.

The jury's findings in response to Questions 6-8 were not inconsistent.

## VI. CONCLUSION

The decision's approval of a FELA case verdict form asking for apportionment of the plaintiff's "condition" to a "pre-existing condition" following a jury's award of damages is contrary to FELA and the law construing it. The inquiry into an irrelevant answer approved below can only confuse the trial of FELA claims. The decision should be disapproved by this Court. Question 8 did not mention the issue of damages, and the Court's conclusion that 70% of the jury's award was for pre-existing damages was contrary to the record and

constituted prohibited fact finding depriving Petitioner of his right to trial by jury on damages.

WHEREFOR, for the reasons above stated, Petitioner respectfully requests this Court to exercise its sound discretion by granting certiorari review of the decision below in the interests of clarifying Colorado law and substantial justice and permit a full briefing schedule and argument of the important issues presented by this case.

DATED this 7th day of July 2006.

Respectfully submitted,

**ROBERTS LEVIN & PATTERSON, P.C.**

/s/ Thomas L. Roberts
THOMAS L. ROBERTS, #5304
1660 Wynkoop Street, Suite 800
Denver, CO 80202
303-575-9390
tlr@rlplaw.com

**LAW OFFICES OF MARTIN E. JACKSON, P.C.**

Martin E. Jackson, #31771
P.O. Box 862
Conifer, CO 80433
303-816-5714
mjackson@ispwest.com

ATTORNEYS FOR PLAINTIFF-APPELLANT
CHARLES A. NICHOLS